Supreme Court, U.S.
FILED
MAY 16 1991
OFFICE OF THE CLERK

No. 90-1609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARILYN GUERINOT, individually, and as representative of the Estate of Major THOMAS C. GUERINOT and as next of friend of TIMOTHY and JONATHAN GUERINOT, minors,

Petitioners,

vs.

ROCKWELL INTERNATIONAL CORPORATION and PRECISION SENSORS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the three-part test in *Boyle v. United Technologies Corporation* establish when a significant conflict exists between the federal interest and state law, sufficient to justify displacement of state law?

2. Were the lower courts correct in their application of the three-part test to two of petitioners' claims, and in finding that petitioners had abandoned two other claims because they did not present any evidence in opposition to respondents' proof?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Rockwell International Corporation ("Rockwell") respectfully submits this brief in opposition to the petition for writ of certiorari in this matter.

STATEMENT OF THE CASE

This case arose when a United States Marine Corps OV-10A aircraft crash landed because of pilot error during an air crew check ride. After landing short of the runway, the severely damaged aircraft slid out of

control, rolling up violently on its right wing just as the crew initiated ejection. The seat of the check pilot, Major Thomas C. Guerinot, was ejected about half as high and twice as far as the seat of the pilot, resulting in Major Guerinot's tragic death.[1] The altitude/airspeed sensor ("sensor") in Major Guerinot's seat was found, in a post-accident investigation, to have malfunctioned because Navy mechanics had fouled the sensor's plunger by misapplying loctite, an epoxy, during overhaul. It is undisputed that the plunger would not have been fouled had the Navy mechanics followed the Navy's overhaul manual, even though this manual was intended for the -1 sensor, not the modified -9 accident sensor. However, Navy mechanics disregarded the manual in two fatal respects. First, they disregarded step-by-step instructions for application and cure of loctite. Second, they failed to functionally check the sensor after overhaul which would have dislodged the misapplied loctite or resulted in the discovery of the binding plunger.

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[1] Rockwell's motion for summary judgment was based on the government contractor defense and on the alternate ground that, since there was no dispute that Major Guerinot's seat was ejected beyond design parameters, or "out of the flight envelope," the same tragedy would have occurred even had the sensor worked perfectly. The district court (affirmed by the Ninth Circuit) did not rule on this alternate basis for Rockwell's motion. Accordingly, for purposes of this petition challenging summary judgment below, respondent Rockwell has assumed that a perfectly functional sensor would have resulted in Major Guerinot's safe recovery.

A. The Primary Issue Presented to the Court Below.

The primary issue presented to the Ninth Circuit was whether the three-part test set forth in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988) is the sole test for determining whether or not the terms of the federal military procurement contract at issue displaces any contrary state law finding of design defect, as respondents Rockwell and PSI contended. Petitioners contended that *Boyle* requires the court to apply a "threshold test" *before* applying the three-part test in order to determine whether there is a "substantial conflict" between the federal interest and state law sufficient to displace state law. The Ninth Circuit (as had the district court) rejected this claim and found that the three-part *Boyle* test, without more, defines the scope of the displacement of state law.

B. Evidence That the Navy Exercised Discretion in Approving Respondents' Design of the Sensor, Including the Choice of Loctite for the Sensor.

Respondent Rockwell's summary judgment motion was based on documentary evidence which proved that the ejection system of the OV-10A aircraft, including the sensor, had been produced by Rockwell and PSI pursuant to design parameters provided by the Navy and had passed all functional tests required by the Navy. The evidence further proved that Navy experts had exercised discretion in reviewing the design of the ejection system, including the design of the sensor, as set forth in detailed design drawings, by modifying and then

approving the final detailed specifications after a long qualification period. In addition, both the Navy and the Air Force took respondent PSI's draft of the overhaul manual for the -1 sensor and adopted it as their own by publishing it with certain changes as a mandatory directive for military personnel.

Notably, Loctite was expressly set forth in the Navy's procurement specifications as an allowable locking agent for the sensor; it was recommended for use in PSI's draft overhaul manual for the sensor; and it was ordered for use by both the Navy and Air Force overhaul manuals. The military was also very familiar with loctite, since it had long since published a detailed military specification discussing the characteristics of various anaerobic substances, including loctite (MIL-S-461563), and it had used loctite for many years.

C. Petitioners Mischaracterize the Facts in Attacking the Finding of the Court Below.

Petitioners mischaracterize the facts presented below. This is apparent when their four factual claims in the district court are compared with the respondents' proof.

Petitioners' first claim was that Rockwell should have produced a two-mode sensor which was fail-safe to the "low" mode, rather than to the "high" mode. Rockwell proved that the Navy had reviewed and approved precise specifications choosing the "high" mode as the fail-safe mode. The petitioners came forward with no contrary evidence. The district court, therefore, properly found that petitioners had abandoned this theory.

Petitioners' second claim was that the sensor failed to operate in the low mode, because it contained dissimilar

metals not properly protected against electrolytic corrosion. When respondent PSI's expert metallurgist demonstrated that the metals used in the accident sensor had been properly anodized and thus protected against corrosion, petitioners failed to produce any contrary evidence. The district court, therefore, found that this claim had also been abandoned.

Petitioners' third claim was that respondents' choice of loctite for the sensor had not been approved by the Navy. However, as just noted, respondents proved that the government knew the characteristics of loctite, and had specifically approved its use in the Navy's overhaul manual. The Navy had also independently procured loctite for, and misapplied it to, the accident sensor. The district court accepted these facts as establishing that the government had specifically approved (indeed required) the use of loctite during overhaul.

Petitioners' fourth claim was that the Navy's overhaul manual based upon PSI's draft had misled Navy mechanics into misapplying loctite by providing "inadequate" warnings to guard against misapplication. However, respondents proved that the Navy had not accepted PSI's offer to prepare an overhaul manual for the modified -9 sensor and that, in any event, Navy mechanics had violated the outdated overhaul manual they used, which had sufficient precautions to assure proper application of loctite.

Based upon these factual findings, the district court and the Ninth Circuit found that the three-part *Boyle* test has been met and the government contractor defense applies.

D. Corrected Recital of Certain Facts

Rockwell proved that "[f]rom the inception of the OV-10A/LW-3B programs through the present, design and modification of the systems was under the control of Government employees with expertise in operations, maintenance, safety and engineering." (Rockwell Exhibit 7, ¶9.)

For example, in November, 1963, the Navy issued a Type Specification as an enclosure to a Navy Request for Proposal. The Type Specification incorporated a military specification that "[t]he seat . . . shall function satisfactorily and adequately clear all airplane structure throughout the speed and altitude ranges of which the aircraft is capable . . . ." (Rockwell Exhibit 7, ¶11.) And in September, 1964, the Navy issued a document which set forth Navy testing requirements for the OV-10A aircraft, including requirements for the ejection seats. (Rockwell Exhibit 7, ¶12.)

There is no dispute that Major Guerinot's seat was ejected at an angle, yet no document prepared by the United States or by respondents required the accident aircraft's LW-3B ejection seat to have ground level ("zero/zero") ejection capability at an angle, but only in a level attitude. In fact, all dynamic testing, which was done with government participation and review was done with this seat ejected from a level attitude.

There were 38 dynamic sled test firings of the LW-3B ejection seat conducted under military supervision. After these tests, the military ordered certain design changes to the LW-3B ejection system. Test results were summarized in a final report which fully described the operation of the two mode LW-3B escape system, including the operation of the two mode sensor. (Rockwell Exhibit 7, ¶20.) After reviewing this report and

different revisions of the Sensor Control Drawing and the Sensor Procurement Specification (Rockwell Exhibit 7, ¶¶ 20 and 21), the Navy specified the use of this system in five of the seven prototype OV-10A aircraft. These aircraft were produced by Rockwell under a development contract with the Navy.

In August, 1966, Rockwell requested that full qualification status be granted to the LW-3B ejection system. (Rockwell Exhibit 7, ¶25.) In September, 1966, the Commander, Naval Air Systems Command, granted full qualification. Thereafter, the Navy set forth all of the above requirements, including specifications and drawings, in Detail Specification SD-556-2 for 223 production aircraft. The Navy approved the Sensor Procurement Specification, Revision "H" in June, 1968 specifying PSI as the manufacturer of the approved sensor. (Rockwell Exhibit 7, ¶34.) In January, 1970, the Navy inspected and accepted the accident aircraft, stating that it conformed to contractual requirements specified in Navy Detail Specification SD-556-2. Clearly, all this was not a cursory "release" of the specifications as petitioners' contend. (Petition p. 4, ¶4.)

In September, 1970, the Air Force, which also operated OV-10A aircraft equipped with the LW-3B ejection seat, issued an urgent action technical order to disable the high mode system of the ejection seat and only permit ejection in the low mode. (Rockwell Exhibit 7, ¶36.) In March, 1971, the Commander, Naval Air Forces in the Pacific, requested that the Navy approve the same modification. After consulting Rockwell, which advised against it since it would likely result in the death of any pilot bailing out above 10,000 feet or above 235 knots, the Commander, Naval Air Systems Command, rejected the Air Force modification. The NAVAIR Commander

discussed the advisability of incorporating a reverse operation plunger which would be fail safe to the low mode rather than to the high mode. The Navy rejected this change as well. The Commander, NAVAIR, then directed Rockwell to provide an Engineering Change Proposal ("ECP") to make certain other changes not relevant here. (Rockwell Exhibit 7, ¶¶ 36-45.) This redesigned sensor, which was supplied by PSI to the Navy, was the -9 sensor ordered by Navy Crew Systems Change No. 252. The accident aircraft was equipped with such a -9 sensor, which exactly conformed to the ECP approved by the Navy. (Rockwell Exhibit 7, ¶¶ 37-47.)

I.

THE TEST FOR DETERMINING WHEN THE GOVERNMENT CONTRACTOR DEFENSE APPLIES WAS ESTABLISHED BY THIS COURT IN *BOYLE v. UNITED TECHNOLOGIES CORPORATION;* THE NINTH CIRCUIT PROPERLY APPLIED *BOYLE* WHEN IT CONCLUDED THAT THE DEFENSE APPLIES IN THIS CASE.

The test for determining whether or not the government contractor defense applies in this case was established by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988).[2] The Ninth Circuit carefully applied the *Boyle*

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[2] This test was a familiar one for the Ninth Circuit, since it established essentially the same "scope of displacement" of state law that the Ninth Circuit itself had previously adopted in *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 451 (9th Cir. 1983), *cert den.*,

(continued)

test to the facts presented and reached the proper conclusion that the elements of the defense are met here. Petitioners misread *Boyle*, and misapply it, in order to challenge this holding in their petition for certiorari.

A. The Boyle Test

The *Boyle* analysis is a straightforward one that bears no resemblance to the confusing formulation of the petitioners.

This Court first determined — as a threshold matter — that disputes involving the procurement of equipment (specifically, the procurement of military equipment) by the United States are in an area of "uniquely federal" interest where preemption of state law by federal law is authorized provided the facts can demonstrate a "significant conflict" between federal policy and the application of state law. (*Boyle, supra*, 108 S.Ct. at 2513-2515.)

The Court then mandated application of a three-part test to determine whether, in fact, a particular military procurement dispute does involve a "significant conflict," sufficient to require the displacement of state law. It held that:

> "Liability for design defects in military equipment cannot be imposed pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifica-

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(ftn. continued)
464 U.S. 1043, 104 S.Ct. 711, 79 L.Ed.2d 175 (1984). (*See Boyle, supra*, 108 S.Ct. at 2518 [approving *McKay*'s "scope of displacement"].)

tions; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *(Boyle, supra,* 108 S.Ct. at 2518.)

B. The Ninth Circuit Correctly Applied *Boyle's* Three-Part Test to the Facts Before it, and Properly Concluded That the Government Contractor Defense Applies in This Case.

Precisely tracking the procedure mandated by *Boyle*, the Ninth Circuit recited — as a threshold matter (*i.e.*, a "necessary first step") — that there is a federal interest in the procurement of military equipment and in forestalling the rise in procurement costs, which sets the stage for the government contractor defense. (See Petition Appendix pp. A5, ¶4 -A6, ¶1 and A7, ¶2.)[3]

The court then applied the three-part *Boyle* test to the facts before it to determine whether or not there is a "significant conflict" between this "unique federal" interest and liability under state law that requires the displacement of state law in this case. On the basis of overwhelming factual support for *Boyle* factors 1 and 3 (there was no issue of material fact with regard to factor

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[3] Contrary to petitioners' contention (Petition pp. 8-9) that the Ninth Circuit cited this "generalized federal interest" in equipment procurement as *the* basis for applying the defense, the court expressly stated that it was only a "necessary first step" in its analysis; scrutiny under the three-part test followed. (Petition Appendix p. A6 ¶1.)

2), the court of appeals held that there is, indeed, a "significant conflict":

(1) *First, the Navy had deliberately "approved" (not merely rubber-stamped) "reasonably precise specifications" for the speed sensor, and this discretionary approval included authorization of loctite as a locking agent in the sensor.* The court cited "extensive" documentary evidence that the Navy and Rockwell had "interacted in more than a cursory way in their negotiations" over the ejection system of the OV-10A and its sensor; proof that the Navy had approved specifications for the speed sensor, including specification of an "epoxy" as a locking agent for the sensor; and proof that the Navy had, in effect, approved the use of loctite in the sensor at issue since (a) the Navy had approved the use of loctite as an "epoxy," (b) the Navy had never disapproved its use, because it had used loctite for years in the model OV-10A aircraft, and (c) the Navy itself — *i.e.*, the Naval Air Rework Facility at Cherry Point, North Carolina ("NARF") — had applied loctite to the aircraft in question in 1980. (See Petition Appendix pp. A8, ¶2; B5, ¶3-B6, ¶1.)[4] In sum, the Ninth Circuit cited ample evidence to support *Boyle* factor 1, the discretion element of the government contractor defense, because it showed that the use of the speed sensor, *and* the use of loctite in the sensor, were carefully considered by the Navy, not merely by Rockwell itself. (*See Boyle, supra,*

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[4] As the district court noted, NARF applied loctite to the sensor at issue because of the "Navy's adoption and use of the overhaul manual for the -1 sensor, which provides for the use of Loctite"; indeed the overhaul manual required the use of loctite during overhaul; it also specified application and cure procedures, and functional testing after application, to guard against just the kind of mishap that occurred. (See appellee Rockwell's brief pp. 16:9-17, 18:1-16.)

108 S.Ct. at 2518; see also appellee Rockwell's brief pp. 38-46 [applying relevant case law to show that the Navy had exercised the requisite discretion in approving reasonably precise specifications, pursuant to *Boyle* factor 1].)

(2) *Second, the speed sensor conformed to the specifications approved by the Navy.* There was no issue of material fact as to this factor. (Petition Appendix p. A8, ¶3.)

(3) *Third, PSI and Rockwell met their duty to warn the government of any dangers known to them, but not known by the Navy*, since there was no evidence that respondents knew of any incident where the plunger of a sensor was hindered from functioning properly due to loctite contamination. Moreover, the Navy itself knew of the danger of loctite contamination without warning from respondents, since the Navy's overhaul manual contained instructions which would have guarded against it. (Petition Appendix pp. A8, ¶4-A9, ¶1; B6, ¶3.)[5]

In short, the Ninth Circuit faithfully applied the analysis mandated by *Boyle* and concluded (as had the district court) that "since the three prongs of the *Boyle* test are met, and there are no issues of material fact, state law will be displaced and the Government Contractor's defense will protect the appellees from liability." (Petition Appendix p. A9.)

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[5] The Navy clearly understood the properties of loctite, since Navy document MIL-S-461563 described the properties, including the adhesive properties, of various anaerobic substances, including loctite.

C. Petitioners Misconstrue *Boyle* in Order to Challenge the Ninth Circuit's Decision.

1. Petitioners Misapply the Three-part Test.

Petitioners' most obvious distortion of *Boyle* — "strenuously argue[d]" to the court below and apparently argued to this Court as well (see Petition p. 7, ¶3) — is that *before* the three-part test is applied, the court must find a "substantial conflict" between the federal interest embodied in the contract and the duty imposed by state law. However, such preliminary scrutiny would eliminate the very need for the three-part test which was devised by this Court as a practical guideline for determining when, in fact, a "substantial conflict" between federal policy and state law exists. (Petition Appendix p. A7.)[6]

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[6] Contrary to petitioners' contention that *Boyle* requires application of two tests — a "substantial conflict" test *and* the three-part test — *Boyle* requires only the latter. Indeed,

> "Between the seminal Ninth Circuit case of *McKay v. Rockwell Int'l Corp*, 704 F.2d 444 (9th Cir. 1983) in 1983, and the recent Fourth Circuit case of *Kleeman v. McDonnell Douglas Corp*, 890 F.2d 698 (4th Cir. 1989), six federal circuits in 16 different appellate cases have had occasion to consider the Government contractor defense in the area of the procurement of military equipment. Not one of these cases has engaged in the type of analysis that the appellants urge the court to adopt. Every one of these 17 circuit court opinions has applied the three-part *Boyle* test as the sole standard for whether the military

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In addition, petitioners misread the specific requirements of *Boyle* factors 1 and 3:

(a) Factor 1

Petitioners fail to successfully argue that the Navy did not 'approve reasonably precise specifications' for the use of loctite, over an allegedly suitable alternative locking agent — *i.e.*, drilling and pinning. (See Petition p. 5.) For although the procurement specification for the speed sensor did authorize a number of locking agents,[7] including "epoxy," and although respondents made the initial choice of an "epoxy" (*i.e.*, loctite) the Navy itself approved this choice, both knowingly and deliberately. As the Ninth Circuit properly found, approval was evidenced by the Navy's longterm use of loctite in the model OV-10A aircraft, the Navy's requirement of loctite in its overhaul manual, and NARF's application of loctite to the aircraft in question pursuant the Navy's manual. Under the case law, such "approval" is sufficient for *Boyle* factor 1. (*See e.g. Dowd v. Textron, Inc.*, 792 F.2d 409 (4th Cir.

(ftn. continued)

> contractor should be shielded from liability by the Government contractor defense." (Appellee's brief pp. 27:18-25 and 28:1-8 and citations p. 28, footnote 10; see also *id.* pp. 23:15-18 and 25:1-6.)

[7] Procurement Specification HC 289-5001 (see M.E. #7J, ¶3.4.2), authorized the use of "standard instrument locking practices using epoxy cement to lock and seal threaded parts that are too small to safety wire." (See Petition p. 5.)

1986).)[8] Indeed, ultimate Navy approval of loctite makes respondents' initial choice of loctite irrelevant for purposes of *Boyle* factor 1. As the *Boyle* Court noted (108 S.Ct. at 2518):

> "The design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design."

(b) Factor 3

Petitioners' argument that there is a factual dispute with regard to *Boyle* factor 3 is equally without merit. (See Petition pp. 6, ¶3 and 16, ¶2-3.) For they do not contend that proper warnings about the dangers of loctite were not made in the Navy's own overhaul manual (adopted from respondent-PSI's draft), but that these warnings were not "adequate."[9] However, *Boyle* factor 3 simply required respondents to warn the Navy about the dangers known to them, but not known to the Navy;

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[8] In *Dowd*, the Fourth Circuit found that there had been approval as required by the *Boyle* test, in the "length and breadth of the Army's [longstanding] experience with the 540 rotor system — and its decision to continue using it," since this demonstrated that "the Army approved the 540 rotor system ... in an atmosphere of awareness and in light of experience." (792 F.2d at 412.)

[9] Indeed, petitioners cite to Mr. McKeown's opinion testimony in his deposition (*i.e.*, "that the capillary action which had drawn the loctite along the plunger 'could occur within the guidelines of the manual, in the sense that no specific precautions were provided about that being a possibility' ") essentially to charge that the danger wasn't sufficiently highlighted to ensure that the average mechanic would follow the precautions mandated in the overhaul manual. (See Petition p. 7.)

the facts are incontrovertible that they did so. Factor 3 did not require respondents to emphasize or reiterate an identified danger; *i.e.*, it did not impose upon the warning requirement, as petitioners contend, a standard of 'adequacy.' Indeed, the *Boyle* Court specifically rejected the Eleventh Circuit's more stringent warning requirement in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (1985) *cert. den.* 108 S.Ct. 2896 (1988) when it stated:

> "it does not seem to us sound policy to penalize, and thus, deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects" (*Boyle, supra,* 108 S.Ct. at 2519.)

2. Petitioners Erroneously Conclude That There Is No "Substantial Conflict" in This Case

From petitioners' confused analysis of the *Boyle* test, *supra*, it is not surprising that they erroneously conclude that there is no "substantial conflict" between federal interest and state law to justify preemption in this case.

For example, they claim that there is "no conflict" because both the contract and state law allegedly require "zero-zero" ejection capability for the seats of the OV-10A aircraft. (See Appellant's opening brief p. 33:1-14.) However, this defines the design aspect at issue too broadly. For it is not the overall requirement of ejection capability that is relevant — but the narrower specification of loctite as the locking agent for the speed sensor *for* the ejection system that is at issue, since system failure was caused by loctite. Ironically, petitioners themselves expressly cautioned the Ninth Circuit

to apply the three-part test as the *Boyle* Court had, by "focus[ing] on the 'design aspect' that is at issue," which petitioners concede is the use of loctite. (Appellants' reply brief p. 5:15-27)

3. Petitioners Make a False Analogy Between the Instant Case and *Boyle's* "Intermediate Situation."

Precisely because there *is* a "substantial conflict" here, petitioners propose a false analogy between the instant case and the kind of "intermediate situation" for which, the *Boyle* Court hypothesized, preemption would be inappropriate. (108 S.Ct. at 2516.)

Boyle's "intermediate situation" involved no "substantial conflict" since under the hypothetical, the government simply specified one performance feature for the equipment it was procuring (*e.g.*, the cooling capacity of an air conditioner), but did not mention the design feature at issue (*e.g.*, the manner of construction), thus leaving the contractor free to "comply with both its contractual obligations and the state-prescribed duty of care." (*Ibid.*) By contrast, in the instant case compliance with respondents' federal and state obligations is impossible, since the Navy specified the use of "epoxy" as a locking agent and then approved loctite as the epoxy of choice, whereas petitioners contend that state law requires the use of a "suitable alternative" to epoxy, drilling and pinning. This represents a clear conflict between the federal interest and state law which disqualifies this case as an "intermediate situation" under *Boyle*.

In short, all roads lead to Rome. For under the Ninth Circuit's proper application of *Boyle*, and even under petitioners' skewed application, only one conclusion is possible: all the elements of the government contractor defense have been met.

II.

THE DISTRICT COURT AND THE NINTH CIRCUIT PROPERLY FOUND THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT PREVENTING APPLICATION OF THE GOVERNMENT CONTRACTOR DEFENSE AND THAT PETITIONERS HAD ABANDONED TWO OF THEIR CLAIMS.

A. There Were No Genuine Issues of Material Fact.

Petitioners claim that the Navy's own overhaul manual, which was based largely on a PSI draft manual, did not give adequate warning regarding the use of loctite since, according to McKeown, " '. . . no specific precautions were provided about [fouling with loctite] . . . being a possibility.' " (Petition p. 7.) They claim that respondents are liable for not adequately warning the Navy of this possibility. This position is erroneous. A contractor is only liable to warn ". . . the United States about dangers in the use of the equipment that were known to the supplier but not to the United States" (*Boyle* at 2518; see discussion at pp. 12, 15-16, *supra*.) Petitioners point to no evidence indicating that either PSI or Rockwell had such superior knowledge. (See Appellee PSI's brief pp. 44-46.)

B. Petitioners Abandoned Two Theories Which Had Been Raised in the District Court.

After three years of discovery, the district court established a date by which motions for summary judgment were to be filed. Petitioners did not make any motion for an enlargement of time based upon Federal Rule of Civil Procedure 56(f). In the face of the clear and uncontroverted evidence presented by respondents in their summary judgment motions — first, that the Navy had approved a two mode sensor which was fail safe to the high mode, and second, that the specifications provided for treatment of dissimilar metals in the sensor to prevent corrosion and, in fact, that the accident sensor had been appropriately treated as required — the petitioners presented absolutely no evidence. Indeed, their Statement of Material Fact No. 57 admitted that the metals were suitably treated and that, in any event, any corrosion on the metals did not play a role in delaying the action of the plunger. Faced with abundant evidence to support respondents' positions on these two issues, and no evidence from petitioners in opposition, despite three years of discovery, the district court and the Ninth Circuit both appropriately found that these issues had been abandoned by the petitioners.

CONCLUSION

For the reasons set forth above, respondents respectfully submit that the petition for writ of certiorari should be denied.

DATED: May 17, 1991.

Respectfully submitted,

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